

EXHIBIT 2

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HB SB 81

**TESTIMONY OF MICHAEL E. BINDAS
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**Montana House Committee on
Taxation**

MARCH 8, 2013

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I thank Representative Miller and the members of the Committee for the opportunity to testify regarding Senate Bill 81. By creating a tax credit for contributions to student scholarship organizations and educational improvement organizations, this bill would expand educational opportunity for Montana's children and empower parents to choose the schools that are best for their children.

My name is Michael Bindas and I am a senior attorney with the Institute for Justice. The Institute for Justice is a non-profit, public interest law firm dedicated to defending the fundamental rights of individuals and protecting the basic notions of a free society. Since its founding nearly 22 years ago, the Institute has defended school choice programs throughout the country on behalf of families whose children attend schools on scholarships made available through such programs. The Institute has twice successfully defended school choice programs in the United States Supreme Court: in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which upheld a publicly-funded voucher program in Ohio; and, more recently, in *Arizona Christian School Tuition Organization v. Winn*, ___ U.S. ___, 131 S. Ct. 1436 (2011), which upheld an Arizona tax credit scholarship program like the one that would be created by SB 81. The Institute has also successfully defended school choice programs in numerous state supreme courts and intermediate courts of appeal. The decisions in these cases make clear that the tax credit program that SB 81 would create is constitutional.

Opponents of SB 81 may nevertheless try to convince you that the program would be unconstitutional. They will argue, I expect, that a tax credit scholarship program would violate provisions of the Montana Constitution—specifically, Article X, § 6¹ and Article V, § 11(5)²—that address appropriations or payments of public funds or monies to religious entities.

They are wrong. The tax credit scholarship program created by SB 81 would not appropriate or pay public funds or monies to anyone. It would create a tax credit for *private* contributions to private non-profit organizations.

A private contribution is not an appropriation or payment of public funds or monies. Nor, for that matter, is the provision of a tax credit, as the United States Supreme Court held with respect to Arizona's individual tax credit scholarship program in *Arizona Christian School*

¹ "The legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination." MONT. CONST. art. X, § 6.

² "No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state." MONT. CONST. art. V, § 11(5).

Tuition Organization v. Winn, ___ U.S. ___, 131 S. Ct. 1436 (2011). The plaintiffs in that case argued that Arizona's program violated the Establishment Clause of the United States Constitution because, they said, it "use[s] State income-tax revenues to pay tuition for students at religious schools," some of which "discriminate on the basis of religion in selecting students." *Id.* at 1441. The Supreme Court dismissed the lawsuit, holding the plaintiffs did not even have standing to challenge the program because "contributions result from the decisions of private taxpayers regarding their own funds." *Id.* at 1448. "When Arizona taxpayers choose to contribute" to scholarship organizations, the Court explained, "they spend their own money, not money the State has collected from respondents or from other taxpayers." *Id.* at 1447. "While the State, at the outset, affords the opportunity to create and contribute" to scholarship organizations, the Court added, "the tax credit system is implemented by private action and with no state intervention." *Id.* at 1448.

State courts have come to the same conclusion. In *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), for example, the Arizona Supreme Court rejected a state constitutional challenge to the same tax credit scholarship program at issue in *Winn*. The plaintiffs in *Kotterman* argued that the program violated portions of the Arizona Constitution providing that "[n]o public money or property shall be appropriated for or applied to any religious . . . instruction," and that "[n]o tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school." The court rejected the argument, holding that the program violated neither provision because the tax credit offered was not an appropriation and did not involve public money. As the court explained,

[N]o money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

Id. at 618; *see also Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App. 2009) (upholding Arizona's corporate tax credit scholarship program under the same reasoning).

The Appellate Court of Illinois came to the same conclusion in twice upholding that state's personal tax credit for educational expenses incurred by parents. "The credit at issue," the court held, "does not involve any appropriation or use of public funds. No money ever enters the state's control as a result of this tax credit." *Griffith v. Bower*, 747 N.E.2d 423, 427 (Ill. App. Ct. 2001) (citation omitted); *see also Toney v. Bower*, 744 N.E.2d 351, 358 (Ill. App. Ct. 2001) ("[W]e reject plaintiffs' argument that a tax credit constitutes a public fund or an appropriation of public money . . .").

In light of these cases, it is clear that the tax credit program created by SB 81 is constitutionally permissible.

Opponents of the bill may attempt to make much of the fact that these cases were resolved under the United States Constitution and the constitutions of states other than Montana. That is a distinction without a difference. First, the reasoning of the cases is equally valid under

the relevant provisions of the Montana Constitution. Second, such reasoning has *already* been adopted in Montana—for example, last year in the litigation over Legislative Referendum (LR) 123. As you know, LR 123 would have created a contingent income tax credit if certain budgetary triggers were met. Plaintiffs challenged the referendum on various grounds, including a claim that it violated Article III, section 5(1), of the Montana Constitution, which prohibits appropriations of money by referendum. The First Judicial District Court rejected that argument and dismissed the claim, concluding that “the granting of an income tax credit is not an appropriation according to any commonly understood sense of the word.” *MEA-MFT v. McCulloch*, No. BDV-2011-961, at *5 (Mont. 1st Jud. Dist. Ct. Mar. 14, 2012) (order on motion to dismiss). Although LR 123 was eventually struck down on *other* grounds, the court’s holding that a tax credit is not an appropriation of public funds was left undisturbed on appeal.

Nevertheless intent on trying to manufacture constitutional uncertainty, opponents of SB 81 will likely invite this Committee to review Justice Nelson’s concurring opinion in *Kaptein v. Conrad School District*, 931 P.2d 1311 (1997) (Nelson, J., concurring). That case, however, has no bearing on the constitutionality of SB 81. *Kaptein* did not involve tax credits, and Justice Nelson’s concern in that case—“subsidizing [a] sectarian school’s educational program” from “the *public treasury*,” *id.* at 1319 (emphasis added)—is simply not a concern when it comes to tax credit programs, which rely on private—not public—funds.³

If the framers of the Montana Constitution had intended to prohibit tax credits like that offered by SB 81, they would have said so. They certainly knew how. For example, a Michigan constitutional provision adopted before the Montana Constitution states plainly that “[n]o . . . credit, tax benefit, exemption or deductions . . . shall be provided, directly or indirectly, to support the attendance of any student . . . at any . . . nonpublic school.” MICH. CONST. art. VIII, § 2. The Montana Constitution, however, contains no such language.

Finally, it is important to note that in addition to the overwhelming judicial precedent supporting a tax credit scholarship program, there is equally clear *legislative* precedent for such a program. Montana has numerous tax credit programs on the books already—tax credits that incentivize individuals and corporations to engage in a broad array of beneficial activities. The credits promote education, as well as social welfare, resource conservation, and economic investment. The College Contribution Credit, for example, allows individual and corporate taxpayers a credit for donations to the endowments of public and private, including religious, universities. The Dependent Care Assistance Credit can be used for day care services provided at faith-based centers. And the Qualified Endowment Credit provides credits to taxpayers who support any of more than a thousand non-profit organizations with a wide variety of missions. Some of these organizations provide scholarships for students to attend private, including

³ Moreover, Justice Nelson’s concurrence is difficult to square with the Montana Supreme Court’s decision in *Montana State Welfare Board v. Lutheran Social Services*, 480 P.2d 181 (Mont. 1971), which held that public assistance payments for indigent women could be used to obtain services at religious social service providers, as such providers are in “no way . . . directly or indirectly benefited by payments to or on behalf of a qualified recipient.” *Id.* at 186.

religious, schools at the K-through-12 and post-secondary levels.⁴ The logic of those who oppose SB 81 directly contradicts the decades-long acceptance of such tax credit programs.

In summary, judicial and legislative precedent supports creating a tax credit scholarship program in Montana. Doing so would expand educational opportunity for Montana's kids and empower parents to choose the schools that will best meet their children's unique educational needs. We therefore respectfully urge this Committee to vote "Yes" on SB 81.

Thank you for your attention and for the opportunity to present this testimony.

⁴ For a more detailed discussion of these and other Montana tax credit programs, *see* DICK M. CARPENTER II, PH.D., & JOHN K. ROSS, INSTITUTE FOR JUSTICE, EXPANDING CHOICE: TAX CREDITS AND EDUCATIONAL ACCESS IN MONTANA (March 2009), *available at* <http://www.ij.org/tax-credits-and-educational-access-in-montana>.

Constitution of Montana -- Article X -- EDUCATION AND PUBLIC LANDS

Section 1. Educational goals and duties. (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

Constitution of Montana -- Article X -- EDUCATION AND PUBLIC LANDS

Section 6. Aid prohibited to sectarian schools. (1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.